UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARL M. BROWN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 90-0007 P***
	)	
GOVERNOR BAXTER SCHOOL FOR THE DEAF,	)	
	)	
	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [1]

The Governor Baxter School for the Deaf (``School''), charged with violating the Age Discrimination in Employment Act (``ADEA'') in its treatment of plaintiff Carl M. Brown, moves for summary judgment on two alternative grounds. The School asserts that the instant suit is barred either by the applicable statute of limitations or by a 1987 settlement in which Brown agreed to refrain from filing complaints pertaining to his employment. Because I find that genuine issues of material fact preclude determination of the merits of either defense, I deny the defendant's motion for summary judgment.

[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

I. SUMMARY JUDGMENT STANDARDS

Fed. R. Civ. P. 56(b) provides that ``[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario, 917 F.2d* at 73.

II. CHALLENGES TO SUBMISSIONS

As a preliminary matter, the parties challenge each other's summary-judgment submissions. The defendant suggests that the plaintiff failed to file a timely objection to the instant motion, effectively waiving his right to object and to file a counter-affidavit. *See* Defendant's Response to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment (``Defendant's Response"). The plaintiff's objection was timely. The defendant filed its motion on February 4, 1991; the plaintiff filed his objection on February 22, 1991.[2] The plaintiff had 10 days in which to object, not counting weekends or holidays. Fed. R. Civ. P. 6(a); Local R. 19(c). The 10 days expired on February 19, at which point the plaintiff was entitled to an additional three consecutive days (pushing the deadline to February 22) because he received the defendant's motion by mail.[3] Fed. R. Civ. P. 6(e).

[2] The defendant incorrectly asserts that the plaintiff filed his objection on February 25, 1991. *See* Defendant's Response.

[3] The defendant's letter to the court accompanying its motion for summary judgment does not specify the method by which it notified the plaintiff of the motion's filing. However, the case file contains no indication that the plaintiff was notified by personal service.

The plaintiff asks the court (1) to strike the defendant's affidavits because not made on personal knowledge and (2) to refuse to consider attached exhibits because not properly sworn or authenticated, in violation of Fed. R. Civ. P. 56(e). *See* Plaintiff's Motion to Strike Defendant's Affidavits and Other Documents; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 2-3. The defendant's submissions are indeed flawed[4]; however, I shall consider them for purposes of this motion because they do not affect the outcome announced herein.

III. FACTUAL CONTEXT

The uncontroverted facts gleaned from the parties' submissions are as follows. Brown was hired by the School on February 28, 1977, Affidavit of Carl M. Brown (``Brown Affidavit") & 6, when he was 60 years old, *id.* & 2. In spring 1987 Alan R. York, personnel manager for the Maine Department of Education, was involved in a series of discussions with Ronald Ahlquist, a field representative of the Maine State Employees Association (``MSEA"), concerning Brown. Affidavit of

[4] The defendant submitted two affidavits, by Alan R. York and Kathleen M. Fries. Both recite that they are made on information and belief as well as on personal knowledge. To be credited for purposes of summary judgment, affiants' statements must derive from personal knowledge. Fed. R. Civ. P. 56(e). Both York and Fries attribute at least one statement to "information and belief" or to having been "informed," leaving the court to speculate (perhaps erroneously) that the rest of their statements were made on personal knowledge. The defendant further offends Fed. R. Civ. P. 56(e) in that the exhibits attached to the York and Fries affidavits are not properly authenticated. The affiants fail to offer certified copies or, alternatively, to swear to the exhibits' accuracy after laying a proper foundation for knowledge of such.

Alan R. York (``York Affidavit") && 1,4. York never spoke to Brown directly during these discussions; he negotiated instead with Ahlquist. *Id.* & 8. The negotiations culminated with the signing of a settlement agreement on May 11, 1987. *Id.* & 6. By its terms, the agreement required the School to pay Brown $1,500, to reimburse Brown three days' pay and all unused vacation time and to expunge any disciplinary action from Brown's personnel file. York Affidavit & 6; Attachment 1 to York Affidavit. Brown was required to be placed on sick leave until June 1, at which time he was to retire, to drop any complaint filed with the Human Rights Commission and to agree ``not to file any complaint pertaining to his employment with the State of Maine." York Affidavit & 7; Attachment 1 to York Affidavit. The agreement was signed by York, Ahlquist, Brown and Robert Larsen. Attachment 1 to York Affidavit. Brown, then a boiler operator for the School, was 71 years old at the time of the signing. York Affidavit && 3-4; Brown Affidavit & 2.

Brown filed a charge of age discrimination with the Maine Human Rights Commission on June 30, 1987. Affidavit of Kathleen M. Fries (``Fries Affidavit") & 2; Attachment 1 to Fries Affidavit. He cashed a check dated July 22, 1987 for $1,500 from the state of Maine. Fries Affidavit & 3; Attachment 2 to Fries Affidavit. By decision dated January 14, 1988 the Maine Human Rights Commission dismissed Brown's complaint after determining ``that there are no reasonable grounds to believe that unlawful discrimination has occurred . . . ." Fries Affidavit & 5; Attachment 4 to Fries Affidavit. On October 7, 1987 Fries received a Notice of Charge of Discrimination from the Equal Employment Opportunity Commission (``EEOC") informing her that Brown had filed a charge of discrimination with the EEOC. Fries Affidavit & 6. The EEOC issued a decision dated March 13, 1989 dismissing the complaint. Fries Affidavit & 7; Attachment 5 to Fries Affidavit.

IV. LEGAL ANALYSIS

The School contends it is entitled to summary judgment because the instant suit is barred by the statute of limitations or, alternatively, by the settlement agreement. The existence of genuine issues of material fact precludes summary judgment on either ground.

A. Statute of Limitations

The ADEA imports its statute of limitations from the Portal-to-Portal Act. 29 U.S.C. '' 626(e); 255(a). A plaintiff must bring a private ADEA suit within two years of the date the cause of action accrued, with one exception. 29 U.S.C. ' 255(a). ``[A] cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . ." *Id.* Brown filed the instant action on January 8, 1990 --more than two years after the date of the most recent alleged discrimination. However, Brown asserts, and I agree, that a genuine dispute exists as to whether a ``willful" act of the School extended his deadline to three years.

The Supreme Court has held that an employer commits a ``willful violation" within the meaning of ' 255(a) if ``the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute . . . ." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The School insists that its problems with Brown stemmed from poor job performance -- in particular an incident in which Brown allegedly slept on the job -- rather than age. York Affidavit && 5,10. However, Brown avers that he did not sleep on the job, Brown Affidavit & 9, that his work record was ``very good" until four months before his ``forced retirement," *Id.* & 7, and that his reprimands included at least two for putting soap on the detergent can beside the sink instead of on the sink and others for failure to replace a teapot after using it, *Id.* && 5, 8. Further, Brown

alleges that Ahlquist informed him he would lose his pension rights and benefits if he did not accept the negotiated settlement, *Id.* & 3, and that he was not knowledgeable about pension matters in May 1987, *Id.* & 10.

Assuming *arguendo* the truth of Brown's averments, one could infer that the School willfully violated the ADEA. Brown charges, in essence, that the School wished to fire him because of his age and manufactured a record of reprimands as a pretext for his discharge. The School then allegedly coerced the unsophisticated Brown into retiring and waiving his rights to file an age-discrimination suit. Such behavior, if not knowingly violative of the ADEA, would show reckless disregard for whether the conduct was prohibited. The issue of willfulness cannot be resolved absent judgment of the truth of a number of sharply disputed facts, including whether Brown was falsely accused of sleeping on the job and whether Ahlquist threatened Brown with loss of pension benefits. Summary judgment hence cannot issue.

B. Bar by Settlement Agreement

While the Court of Appeals for the First Circuit has not had occasion to consider whether and under what conditions a person may sign a binding release of rights to file an age-discrimination lawsuit, a number of other circuits have. Such releases have been deemed valid and enforceable -- but only under certain circumstances. In a thoughtful decision canvassing the caselaw, the Second Circuit adopted a protective ``totality of the circumstances" test for assessing the enforceability of such releases. *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 110 S. Ct. 292 (1989). The Second Circuit advised courts to weigh a non-exhaustive list of factors, among them

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. (quoting *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988). The Second Circuit advised courts to consider, as well, ``whether an employer encourages or discourages an employee to consult an attorney . . . and whether the employee had a fair opportunity to do so." *Id.* (citation omitted). I find the Second Circuit's reasoning persuasive, particularly in light of subsequent congressional developments.[5] Applying the *Bormann* test, I cannot determine on this record that Brown's waiver was knowing and voluntary as a matter of law.

[5] In 1990 Congress enacted legislation codifying its own ``totality of the circumstances" test for judging whether a waiver of ADEA rights is ``knowing and voluntary." *See* 29 U.S.C. ' 626(f). Congress provided that its stringent test not apply to waivers occurring before the date of the legislation's enactment. *See* Pub. L. No. 101-433 ' 202(a), 1990 U.S. Code Cong. & Admin. News (104 Stat.) 984.

While the agreement in question seems clear, and Brown accepted consideration in exchange for his promises, disputes that bear on other factors preclude summary judgment. Brown's education and business experience are not a matter of record; however, he was a boiler operator, York Affidavit & 4, and avers that he was not knowledgeable about his pension rights or benefits in May 1987, Brown Affidavit & 10. It is not clear how long Brown possessed or had access to the agreement before signing it; however one may infer the period was less than 11 days.[6] Brown apparently played no direct role in negotiating the agreement. *Id.* & 8. I find no evidence indicating whether the School encouraged or discouraged Brown to seek an attorney or whether Ahlquist was an attorney. In any event, Brown casts doubt on the efficacy of his representation by Ahlquist by averring that Ahlquist told him he should sign or lose his pension rights. Brown Affidavit & 3. The School, on the other hand, cites the Maine Human Rights Commission's determinations that ``Mr. Brown fails to present persuasive evidence that he was forced to retire under threat of losing his pension" and ``there is no evidence to suggest that his participation was anything but voluntary." Fries Affidavit & 4; Attachment 3 to Fries Affidavit.

The parties present conflicting evidence as to whether Brown's waiver was voluntary and knowing. Absent fact-finding, I cannot determine whether the May 1987 agreement meets the *Bormann* test.

[6] Brown allegedly slept on the job on April 30, 1987, York Affidavit & 5, triggering negotiations that lead to the signing of the agreement on May 11, 1987, *Id.* && 5-6.

V. CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is hereby ***DENIED***.

Dated at Portland, Maine this 26th day of April, 1991.

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David M. Cohen
United States Magistrate Judge